91-95

Supreme Court, U.S.
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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM 1991

STEPHEN C. REDDY
Petitioner,

VS.

LITTON INDUSTRIES, INC., a Delaware corporation, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a plaintiff have standing to sue under 18 U.S.C. Sec. 1962(c) and 1964(c) where he was discharged from his employment and targeted for fraud, intimidation, and retaliation because he refused to participate in his employer's pattern of racketeering activities in violation of the Racketeer Influenced And Corrupt Organizations Act, or are the injuries flowing from his refusal not proximately caused by the conduct constituting the violation such that RICO standing is properly denied?

2. Does a plaintiff have standing under 18 U.S.C. Sec. 1962(d) and 1964(c) to sue for injuries resulting from a conspiracy to violate the Racketeer Influenced And Corrupt Organizations Act only when injured by overt acts of conspiracy which are themselves statutorily defined as predicate acts of racketeering under Sec. 1961(1) as the Ninth and Second Circuits have held, or does a plaintiff have standing to sue for injuries resulting from a conspiracy in violation of Sec. 1962(d) whether the overt act causing injury is defined as a predicate act or not, as the Third Circuit has held?

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STEPHEN C. REDDY
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VS.

LITTON INDUSTRIES, INC., a Delaware corporation, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Stephen C. Reddy, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 16, 1990.

OPINION BELOW

The Court of Appeal's opinion below is reported at 912 F.2d 291 (9th Cir. 1990). The opinion is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered August 16, 1990. The petition for rehearing in the Court of Appeals was denied on May 23, 1991. The Court of Appeals stayed the issuance of the mandate on June 13, 1991 pending this petition.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

1. 18 U.S.C. Sec. 1962 (Prohibited activities) provides:

> (c) "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."
>
> (d) "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

2. 18 U.S.C. Sec. 1964 (Civil remedies) provides:

> (c) "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold damages he sustains and the cost of the suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

On September 30, 1988 Petitioner, plaintiff below, amended his wrongful termination complaint under California law against Respondents, defendants below, which was then pending in the Los Angeles County Superior Court. The amended complaint added, *inter alia*, claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sec. 1961, *et seq.* (RICO), alleging

specifically a substantive violation under Sec. 1962(c) and a conspiracy under Sec. 1962(d).

On October 28, 1988 Respondents removed the action to federal court pursuant to 28 U.S.C. Sec. 1446(b), and thereafter filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(B)(6). On December 12, 1988, the District Court granted the motion with prejudice. Petitioner appealed the ruling to the United States Court of Appeals for the Ninth Circuit.

The amended complaint alleged that during the 1980's Respondents were engaged in selling its military Command and Control Radar Communication (C3) system to the Government of Saudi Arabia. In 1980 Petitioner was hired by Respondents to administer the housing aspects of the Saudi Arabia contract. The complaint further alleged that during the course of his employment, Petitioner discovered the fact that Respondents had offered, promised, and paid bribes, kickbacks, or unlawful contingent fees to officials of the Government of Saudi Arabia, or their agents, in the return for the award of military contracts, and had thereafter devised a scheme to conceal and cover-up these facts through the administration of the housing sub-contract for which Petitioner was responsible. The complaint went on to allege Petitioner documented his findings, presented them to his superiors at work, and refused to participate in the cover-up. As a result of his refusal to participate, he was discharged from employment with Respondents in 1985.

The amended complaint asserted violations of Sec. 1962(c) based on the predicate acts of bribery, mail and wire fraud, obstruction of justice, and Travel Act violations, and of Sec. 1962(d) based on a conspiracy to violate Sec. 1962(a) and (c). In support of his claim of

standing to sue under Sec. 1964(c), Petitioner alleged, in addition to the claim that he had standing because he was wrongfully terminated for his refusal to participate in a cover-up of his employer's pattern of racketeering, that he was also the direct target of a scheme to defraud in violation of 18 U.S.C. sec. 1341 and 1343 whereby he was fraudulently induced to accept and continue employment by false representations which caused him to lose income and suffer damage to his reputation, and that he was also the direct target of retaliation and intimidation, intended to conceal the racketeering activity by deterring Petitioner from reporting his employer's conduct to law enforcement, through a threat to cause his security clearance to be revoked, in violation of 18 U.S.C. Sec. 1510-1512.

On August 16, 1990 the Court of Appeals affirmed, holding Petitioner lacked standing under Sec. 1962(c) "because the injury he suffered was the result of his alleged wrongful termination and was not caused by predicate RICO acts." (Appendix A, p. 294). With regard to the conspiracy claim under Sec. 1962(d), the Court of Appeals reviewed the "developing standing analysis" and the conflict between the Second and Third Circuits over standing to allege injuries resulting from a Sec. 1962(d) conspiracy. The Court below adopted the view of the Second Circuit and held a plaintiff has standing under Sec. 1962(d) only when injured by an overt act of conspiracy which is itself a predicate act under 18 U.S.C. Sec. 1961(1) (Appendix A, p. 294-295).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve "the seemingly varying approaches taken by the circuits with regard to standing under RICO", *Dept. of Economic Devel. v. Arthur Anderson & Co.*, 747 F.Supp. 922, 940 (S.D.N.Y. 1990), and end the sharp disagreement in the lower courts which has developed over the fundamental question of who has standing to sue under RICO. Since this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) where it was held a plaintiff has standing only if he has been injured in his business or property by the conduct constituting the violation, "[v]arious courts have held that standing to pursue a RICO action exists even though there is no allegation by the plaintiff that it was a target of the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury. See, e.g. *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 472 (8th Cir. 1985), *cert denied,* 475 U.S. 1082, 106 S.Ct. 1460, 1461, 89 L.Ed. 2d 718 (1986); *Lewis v. Lhu*, 696 F.Supp. 723, 727 (D.D.C. 1988); *Pandick, Inc. v. Rooney*, 632 F.Supp. 1430, 1433 (N.D. Ill. 1986)." *Dept. of Economic Devel. v. Arthur Anderson & Co.*, 747 F.Supp. 922, 939-940 (S.D.N.Y. 1990). The decision below, however, relying on decisions in four other circuits, reads *Sedima* differently and adopts a conflicting view of what this Court meant in *Sedima* concerning the causality between the prohibited conduct and the plaintiff's injuries required to establish standing under Sec. 1962(c).

Further, this case also presents an additional standing question under the conspiracy section, 18 U.S.C. Sec. 1962(d), not considered in *Sedima* nor addressed in any subsequent opinion of this Court, over which there has also developed a split of authority among the circuits. The decision below adopts the view of the Second Circuit that a plaintiff has standing under Section 1962(d) only when injured by overt acts of conspiracy, which are themselves statutorily defined as predicate acts under Section 1961(1), *Hecht v. Commerce Clearing House, Inc.*,

897 F.2d 21 (2nd Cir. 1990), whereas the Third Circuit holds a plaintiff has standing under Section 1962(d) whether an overt act causing injury is defined as a predicate act or not. *Shearin v. E. F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989).

As a result, a plaintiff like this Petitioner who asserts a claim under Section 1962(c) and Section 1962(d) because he was discharged from his employment for his refusal to participate in a cover-up of his employer's racketeering activity and because he was targeted for fraud, intimidation and retaliation, would have standing under Section 1964(c) in the Eighth Circuit (*Terre Du Lac Association, Inc. v. Terre Du Lac Inc.*, 772 F.2d 467, 472-473 (8th Cir. 1985) *cert denied* 475 U.S. 1082 (1986); *Alexander Grant and Co. v. Tiffany Industries* ("Grant I"), 742 F.2d 408 (8th Cir. 1984), *vacated*, 473 U.S. 922 (1985), *readopted* (Grant II), 770 F.2d 717, *cert denied* 474 U.S. 1058 (1986), *Komm v. McFliker*, 662 F.Supp. 924 (W.D.Mo. 1987); the Sixth Circuit (*Grantham and Mann, Inc. v. American Safety products, Inc.*, 831 F.2d 596, 606 (6th Cir. 1987) (dicta); *Williams v. Hall*, 683 F.Supp. 639, 641 (E.D.Ky. 1988); the Fourth Circuit (*Busby v. Crown Supply, Inc.*, 896 F.2d 833, 839-840 (4th Cir. 1990) (concerning Sec. 1962(a); the Third Circuit (*Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989) (concerning 1962(d), *Callan v. State Chemical Manufacturing Co.*, 584 F. Supp. 619, 623 (E.D.Pa. 1984) (pre-*Sedima* decision); *Acampora v. Boise Cascade Corp.*, 635 F.Supp. 66, 69 (D.N.J. 1986) (post-*Sedima* decision; and in the D.C. Circuit (*Yellow Bus Lines, Inc. v. Local Union 639,* 883 F.2d 132, 143 (D.C.Cir. 1989); *Lewis v. Lhu,* 696 F.Supp. 723, 727 (D.D.C. 1988), whereas the same plaintiff in the First, Second, Fifth, Ninth and Eleventh Circuits would be denied relief under RICO (See Appendix A, p. 294).

Each question presented in this petition represents an important question of federal law which has not been, but should be, settled by this Court. "In light of the variety of approaches taken by the lower courts and the importance of the issues", *Sedima,* 473 U.S., at 486, it is respectfully submitted that the petition should be granted.

I.

THE COURT SHOULD GRANT THE PETITION TO ESTABLISH A UNIFORM PROXIMATE CAUSE STANDARD UNDER RICO AND RESOLVE THE CONFLICT AMONG THE LOWER COURTS OVER WHAT CAUSAL CONNECTION BETWEEN THE RICO CONDUCT AND PLAINTIFF'S INJURIES MUST BE SHOWN TO ESTABLISH STANDING UNDER 18 U.S.C. SEC. 1964(c).

Since the Court's decision in *Sedima* the lower courts have been unable to formulate a uniform rule regarding proximate causation for standing purposes under Sec. 1964(c). Some courts, like the court below, view the question narrowly and focus the proximate cause analysis on direct injuries in response to the language in *Sedima* that the "harm caused by the predicate acts" is the cognizable injury. (See, Appendix A, p. 294 and the cases cited therein). Other courts, however, view the question more broadly, and hold that even though the plaintiff only alleges that he suffered an indirect injury, standing exists. See e.g., *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.,* 772 F.2d 467, 472-473 (8th Cir. 1985) *cert denied* 475 U.S. 1082 (1986). These courts believe that a more traditional proximate cause analysis is required by *Sedima's* teaching that the "recoverable damages occurring by reason of a violation of Sec. 1962(c) will *flow from* the commission of the predicate acts", See, e.g., *Bass v.*

Campagnone, 838 F.2d 10, 11-12 (1st Cir. 1988) (emphasis in original); *Busby v. Crown Supply, Inc.,* 896 F.2d 833, 839-840 (4th Cir. 1990) ("[W]e believe that *Sedima* instructs us to employ a traditional causation analysis in determining whether a RICO plaintiff has been injured 'by reason of' a section 1962 violation") and allow standing under *Sedima's* instruction that the statute is to be broadly construed. *Terre Du Lac Ass'n Inc., supra; Shearin v. E.F. Hutton Group, Inc.,* 885 F.2d 1162, 1168-1170 (3rd Cir. 1989); *Acampora v. Boise Cascade Corp.,* 635 F.Supp. 66, 69 (D.N.J. 1986) ("Plaintiff does not allege that she was injured *directly* by defendant Tisony's stealing activities (the predicate offenses). Her injury, however, flowed from the defendant's commission of a pattern of racketeering in connection with the conduct of an enterprise".) (emphasis in original); *Lewis v. Lhu,* 696 F.Supp. 723, 727 (D.D.C. 1988) ("All that is required to sustain standing under RICO is an allegation that plaintiffs' injuries flowed, directly or indirectly, from defendants' fraudulent acts.") *Williams v. Hall,* 683 F.Supp. 639, 644 (E.D.Ky. 1988) ("... And, oh yes, let's fire all of the honest employees in the company, so we won't have any opposition in accomplishing our scheme... The Court believes that Congress intended to afford the discharged employees a remedy in such a situation and that the Supreme Court following *Sedima* would so interpret the RICO statute.")

The result of these divergent views has been that lower courts are straining to draw distinctions between, for example, injuries "that can be traced to a RICO predicate act" and those injuries that 'flow from' a RICO predicate act," See, e.g., *Collum v. Hibernia National Bank* (Collum II) 859 F.2d 1211, 1218 n.15 (5th Cir. 1988), because there is no clear statement by this Court on the question of proximate causation under Sec. 1964(c).

The question of what injuries are proximately caused by the proscribed conduct under RICO is essentially a question of law of the highest magnitude concerning a significant statute. As Chief Judge Feinberg observed in a recent case in which the Second Circuit attempted to provide guidance on the question of proximate causation under 1964(c):

> "It is clear that both direct and indirect injuries must be proximately caused... However, 'despite the manifold attempts which have been made to clarify the subject [of proximate cause, there is not] yet any general agreement as to the best approach,' either in torts or as applied to RICO (citation omitted).
>
> * * *
>
> This opinion has admittedly not set out a rule that will mechanically generate a solution to all RICO causality problems. Too many competing policies are gathered under the label 'proximate cause' to make a simple rule possible. Instead, we must be content with making our best efforts to make recovery commensurate with the statutory wrong and to set out 'our more or less inadequately expressed ideas of what justice demands' in each case." (Citation omitted)

Sperber v. Boesky, 849 F.2d 60, 64-66 (2nd Cir. 1988).

It is respectfully submitted that this Court should forge a general agreement as to the best approach to follow on the fundamental question of who may sue under RICO and for what injuries, by granting the petition and resolving the various approaches taken by the lower courts over RICO causality with a uniform rule of proximate causation applicable to RICO. Judges, lawyers and

litigants need to know what injuries are compensable under RICO in order to either preserve limited judicial resources which are wasted each day considering claims for injuries under Sec. 1964(c) not proximately caused by RICO conduct, or on the other hand, to fulfill the mandate of the statute in those claims for injuries that are.

II.

THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE CIRCUITS OVER THE QUESTION OF STANDING UNDER 18 U.S.C. SEC. 1962(d) AND 1964(c) FOR INJURIES RESULTING FROM RICO CONSPIRACIES.

In its opinion below, the Ninth Circuit adopted the position taken by the Second Circuit in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25-26 (2nd Cir. 1990) that a plaintiff has standing under 18 U.S.C. Sec. 1962(d) and 1964(c) only when injured by overt acts of conspiracy which are themselves statutorily defined predicate acts of racketeering under Sec. 1961(1). (Appendix A, p. 294-295) As the Ninth Circuit recognized, its decision denying petitioner standing under Sec. 1962(d) because the act of terminating his employment is not a predicate act as defined by Sec. 1961(1), is in direct conflict with the decision of the Third Circuit in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-1170 (3rd Cir. 1989).

In *Shearin*, the Third Circuit held that the allegation as made in this case, that an individual who was discharged from his employment in furtherance of a conspiracy in violation of Sec. 1962(d), states a claim for relief under Sec. 1964(c). The Third Circuit based its decision on *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The Court stated:

"In *Sedima*, the Court correctly reasoned that 'racketeering activity' and 'predicate acts' amount to the same thing under section 1962's first three subsections. A pleading of investment, acquisition, or participation through a pattern of racketeering necessarily incorporates the prior racketeering activity in alleging RICO violations under section 1962(a), (b) or (c). That is not true of section 1962(d). Predicate acts for conspiracy do not of necessity consist of section 1961(1) racketeering activity. To the contrary, a conspiracy to commit the other RICO violations may occur absent the actual commission of the other violations or the racketeering activities that underpin them. All that need be shown is that the conspirators agreed to engage in a pattern of racketeering activity. See *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982). Acts that further a section 1962(d) conspiracy thus may cause harm even when they do not themselves qualify as racketeering activity. Taking into account all the provisions of section 1962, either racketeering activity or classic overt conspiracy acts may qualify as 'predicate acts' to a RICO violation causing injury.

Sedima further indicates that classic conspiracy acts not only may, but should, so qualify. This accords with RICO's plain meaning. Section 1964(c) states that a person need only sustain an injury 'by reason of section 1962' in order to sue. Echoing this language, the Supreme Court expressly required that a person be 'injured in his business or property by the conduct constituting the violation'; it did not mandate that racketeering activity cause the harm. 473 U.S. at 497, 105 S.Ct. at 3285. Rather, the Court opined at length that 'RICO is to be read broadly,' with a view toward 'activity which RICO was de-

signed to deter,' and so be 'liberally construed to effectuate its remedial purposes.' 478 U.S. at 497-500, 105 S.Ct. at 3285-3287 (citation omitted). Given this dictate, it would be anomalous to allow plaintiffs to recover for harm suffered from investment in, or control or conduct of a pattern of racketeering, yet preclude recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering." Id., p. 1169-1170.

The Third Circuit's approach also finds support in *Williams v. Hall*, 683 F.Supp. 639, 642-644 (E.D.Ky. 1988) where the Court considered the question whether a plaintiff has standing to sue under RICO if he can show the existence of a conspiracy to violate RICO under Sec. 1962(d) where some overt acts committed in furtherance of the conspiracy were prohibited predicate acts under Sec. 1961, but where his only injury, an alleged discharge from employment was caused by other overt acts which were not predicate acts under Sec. 1961. The Court held plaintiff had standing, reasoning that "liability for civil conspiracy is geared to damage caused by commission of overt acts done in furtherance of the conspiracy." Id., p. 643. The Court stated:

> "The common law of civil conspiracy looks to overt acts as the source of compensable injury. See *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (citations omitted). The Court believes that the Supreme Court, if called upon to address the issue, would follow the common law of civil conspiracy in determining standing under Sec. 1962(d)... This Court now holds that a plaintiff who has proven a Sec. 1962(d) conspiracy to violate Sec. 1962(a) or (c) has standing to recover under 1964(c) if he can show injury from any overt acts done pursuant to the conspiracy. This holding is not contrary to the language of the Supreme Court in *Sedima* to the effect that the injury must be caused by the predicate acts, because the Court was only discussing Sec. 1962(c) at that point. See, *Sedima*, 105 S.Ct. at 3286. The Court is of the opinion that the other language of *Sedima* concerning the liberal construction to be given RICO dictates at least that damage from a RICO conspiracy is actionable to the same extent as damage from a common law or antitrust conspiracy. Id., p. 642-643."

See also, *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983) ("A conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy... [A] reasonably foreseeable consequence of the scheme [is] a sufficient basis for imposing tort liability.")

The decision below, however, along with the Second Circuit's decision in *Hecht*, unjustifiably reads a standing restriction or limitation into the conspiracy section which is not supported by the text of Sec. 1964(c). Section 1964(c) does not provide a remedy for injury caused "by reason of" Sec. 1961; it provides a remedy for an injury caused "by reason of" Sec. 1962. To say that an injury resulting from a conspiracy under Sec. 1962(d) is compensable under 1964(c) only to the extent the overt act of conspiracy causing the injury is itself a statutorily defined predicate act under Sec. 1961(1), is the equivalent of saying, under Sec. 1962(c), that an injury resulting from a violation of Sec. 1962(c) is compensable under Sec. 1964(c) only to the extent the predicate acts causing the injury were performed as part of the conduct of an

enterprise in violation of Sec. 1962. It was precisely this type of "amorphous and unfounded restrictions" which the Court struck down in *Sedima. American National Bank & Trust Co. v. Harco, Inc.*, 473 U.S. 606, 609 (1985). The Ninth and Second Circuit's judicially fashioned standing requirement under Sec. 1962(d) represents another "form of statutory amendment" not "appropriately undertaken by the courts". *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S., at 500.

The plain language of Sec. 1964, when read in conjunction with Sec. 1962(d) requires only that plaintiff suffer injury caused by the conspiracy, not by the pattern of racketeering resulting from the conspiracy. He only has standing if, "and can only recover to the extent that, he has been injured in his business or property *by the conduct constituting the violation." Sedima*, p. 496 (emphasis added). The "conduct constituting the violation" under Sec. 1962(d) is a conspiracy to violate (a), (b) or (c), and not the commission of acts defined as predicate acts under Sec. 1961(1). The text of Sec. 1962(d) says nothing about overt acts in furtherance of the conspiracy, much less anything about those overt acts having to be predicate acts of racketeering. To require for standing purposes under Sec. 1962(d) a showing of injury caused by an overt act which is itself a predicate act for (a), (b) or (c)'s pattern of racketeering acts purposes renders 1962(d) statutorily redundant of 1962(c)'s pattern requirement.

III.

CONCLUSION

For these various reasons, it is respectfully submitted the Petition should be granted.

DATED: July 12, 1991.

Respectfully submitted,

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Counsel of Record

APPENDIX A

APPENDIX A

STEPHEN C. REDDY,
Plaintiff-Appellant,
v.
LITTON INDUSTRIES, INC., a Delaware corporation, and its Wholly Owned Subsidiary and Alter Ego Enterprises, Litton International Development Corporation, Litton Data Systems, Litton Saudi Arabia Ltd., Litton Technology Corporation, Ltd., Litton Systems, Inc., Litton Data Command Systems, Litton Data Systems Division of Litton Systems, Inc., and Does 1 through 100, Inclusive,
Defendants-Appellees.

No. 89-55008.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 5, 1990.
Decided Aug. 16, 1990.

Former employee brought suit in state court against employer and its subsidiaries, charging employer with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). Plaintiff alleged that he was wrongfully discharged from his job because he refused to participate in employer's cover-up of illegal bribes to foreign officials that were intended to secure the award of certain military contracts. After removal of the action, the United States District Court for the Central District of California, Ferdinand F. Fernandez, J., dismissed federal claims with prejudice and remanded pendent claims to state court. Plaintiff appealed dismissal of his RICO claims. The Court of Appeals, Orrick, Senior District Judge, sitting by designation, held that: (1) plaintiff lacked standing to sue under section of RICO prohibiting

the conduct of an enterprise's affairs through a pattern of racketeering activity because injury plaintiff suffered was a result of alleged wrongful termination and was not caused by predicate RICO acts; (2) plaintiff lacked standing to sue under section of RICO which makes it unlawful for any person to conspire to violate the RICO statute; and (3) plaintiff lacked standing to sue under section of RICO prohibiting the use or investment of racketeering income.

Affirmed.

1. Racketeer Influenced and Corrupt Organizations — 59

A plaintiff has standing to sue under section of the Racketeer Influenced and Corrupt Organizations Act (RICO) prohibiting the conduct of an enterprise's affairs through a pattern of racketeering activity if he has been injured in his business or property by the conduct constituting the violation. 18 U.S.C.A. § 1962(c).

2. Racketeer Influenced and Corrupt Organizations — 62

To have standing to sue under section of the Racketeer Influenced and Corrupt Organizations Act (RICO) prohibiting the conduct of an enterprise's affairs through a pattern of racketeering activity, plaintiff must demonstrate that the harm he suffered was caused by the predicate acts of racketeering. 18 U.S.C.A. § 1962(c).

3. Racketeer Influenced and Corrupt Organizations — 62

Former employee who alleged that he was wrongfully discharged because he refused to participate in cover-up of illegal bribes to foreign officials intended to secure

award of military contracts to employer did not have standing to sue under section of Racketeer Influenced and Corrupt Organizations Act (RICO) prohibiting conduct of an enterprise's affairs through a pattern of racketeering activity; injury which employee suffered was a result of his alleged wrongful termination and was not caused by predicate RICO acts. 18 U.S.C.A. § 1962(c).

4. Conspiracy — 6

Former employee did not have standing to bring suit for violation of section of a Racketeer Influenced and Corrupt Organizations Act (RICO) which makes it unlawful for any person to conspire to violate the RICO statute, based on allegation that he was wrongfully discharged for refusing to participate in cover-up of illegal bribes to foreign officials intended to secure award of military contracts to employer; act of terminating employee was not a predicate act as defined by RICO, nor was the act essential to the alleged conspiracy between employer and foreign officials. 18 U.S.C.A. §§ 1961(1), 1962(d).

5. Racketeer Influenced and Corrupt Organizations — 58

Former employee who alleged that he was wrongfully discharged for refusing to participate in cover-up of illegal bribes to foreign officials intended to secure award of military contracts to employer did not have standing to bring suit under section of the Racketeer Influenced and Corrupt Organizations Act (RICO) prohibiting use or investment of racketeering income, where employee did not plead that he was injured by the use or investment of racketeering income, or allege that he was injured by any of the predicate acts covered by RICO. 18 U.S.C.A. § 1962(a, c).

6. Federal Civil Procedure — 851

It is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile.

7. Federal Civil Procedure — 851

It was not an abuse of discretion to refuse to permit plaintiff to amend complaint charging employer with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), which led to his alleged wrongful termination, where complaint made clear that plaintiff lacked standing because his injury was caused by alleged wrongful termination, and was not the result of alleged predicate acts of racketeering; it would not have been possible for plaintiff to amend complaint to allege a completely new injury that would confer standing to sue without contradicting any of the allegations of his original complaint. 18 U.S.C.A. §§ 1961-1968.

Noel Shipman, Los Angeles, Cal., Wilfred A. Hearn, Jr., Washington, D.C., for plaintiff-appellant.

Brad D. Brian, Glenn D. Pomerantz, Munger, Tolles & Olson, Los Angeles, Cal., John D. Lang, Law Offices of John D. Lang, Woodland Hills, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before CANBY, and LEAVY, Circuit Judges, and ORRICK,* Senior District Judge.

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*Honorable William H. Orrick, Senior United States District Judge, for the Northern District of California, sitting by designation.

ORRICK, Senior District Judge:

In this wrongful employee termination suit brought by plaintiff-appellant, Stephen C. Reddy, against defendants-appellees, Litton Industries, Inc. and its subsidiaries ("Litton"), charging Litton with violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, we are met first with the threshold question whether Reddy had standing to bring a RICO action based on wrongful employee termination.[1] Holding that he does not, we affirm.

I.

During the 1980's, Litton was engaged in selling its military Command and Control Radar Communication ("C3") system to Saudi Arabia. Reddy was hired by Litton in 1980 to administer the housing aspects of this Saudi Arabian transaction.

Reddy claims that in the course of his employment he uncovered a bribery scheme involving Litton, Prince Khalid Bin Sultan Abdul Aziz, Deputy Commander of the Saudi Arabia Air Defense Command, and other Saudi government officials. Prince Khalid's father, Prince Sultan Bin Abdul Aziz, was Saudi Arabia's Minister of Defense and Aviation during this time. Reddy claims that Prince Sultan signed a contract on behalf of Saudi Arabia to purchase the C3 system from Litton as a result of unlawful payments that his son, Prince Khalid, received from Litton.

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[1]In his second amended complaint, Reddy also alleged breach of the implied covenant of good faith and fair dealing, and conspiracy to obstruct justice under 42 U.S.C. § 1985(2).

Reddy alleges that, upon his discovery of this bribery scheme, he reported it to his superiors. Thereafter, Litton terminated his employment. Reddy then filed this lawsuit alleging that he was wrongfully discharged from his job because he refused to participate in Litton's cover-up of illegal bribes to Saudi Arabian officials that were intended to secure the award of certain Saudi Arabian military contracts.

Litton removed this action to federal court pursuant to 28 U.S.C. § 1446(b), and filed a motion to dismiss the second amended complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6). The district court dismissed Reddy's federal claims with prejudice, and remanded his pendent claims to state court.

Reddy appeals only the dismissal of his RICO claims. He argues that the district court erred in finding that he lacked standing to sue under RICO, erroneously determined that he failed to allege a pattern of racketeering activity, incorrectly ruled that he failed to adequately plead a RICO enterprise, and erroneously found that his RICO claims were barred by the act of state doctrine. Finally, he argues that, even if the district judge's dismissal of his RICO claims was proper, it was an abuse of discretion to have dismissed these claims without leave to amend. Inasmuch as the decision of the district court is affirmed here on standing grounds, it is unnecessary to reach the other grounds for reversal asserted (satisfaction of the RICO "pattern" requirement, the adequacy of pleading of a RICO enterprise, and the applicability of the act of state doctrine).[2]

[2]Following the district court's dismissal, Litton filed a complaint against Reddy for malicious prosecution. It was directed at Reddy's claim under 42 U.S.C. § 1985(2), which the district judge dismissed with the suggestion that it bordered on being frivolous. Reddy attached documents to his opening brief in this appeal relating to the malicious prosecution action that were not part of the record below. Litton moved to strike these exhibits.

Federal Rule of Appellate Procedure 30(a) and Ninth Circuit Rule 10-2 state that only documents in the district court record can be included in an appendix to an appellate brief. The language of these rules is clear. Inclusion of these documents in an appellate brief was improper. Litton's motion to strike Reddy's Exhibits A and B is granted.

Both parties requested sanctions against the other in connection with this matter. Reddy contends that Litton filed its complaint for malicious prosecution to harass him and deter him from pursuing this appeal. Litton argues that Reddy's inclusion of Exhibits A and B in his appellate brief was an improper attempt to prejudice the court.

Neither party has persuaded the court that sanctions are warranted. Reddy has produced no evidence that Litton's complaint for malicious prosecution is frivolous. Litton has not demonstrated that Reddy's motivation for including these exhibits was improper. Both requests for sanctions are, therefore, denied.

II.

The district court's dismissal of the RICO cause of action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893 (9th Cir. 1988), *cert denied*, ____U.S. ____, 109 S.Ct. 1532, 103 L.Ed.2d 837 (1989). All allegations in the complaint must be treated as true. *Church of Scientology of Cal. v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

A.

[1] Reddy's complaint alleges violations of U.S.C. § 1962(a), (c), and (d) against Litton. We deal first with Reddy's standing to bring an action under § 1962(c). The standing requirement under § 1962(c)[3] has been well established since the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). The RICO civil remedies provision, 18 U.S.C. § 1964(c), provides that remedies are available under the statute to "[a]ny person *injured in his business or property by reason of a violation of section 1962 of this chapter* . . . " (Emphasis added.) The Supreme Court in *Sedima,* construing the "by reason of" language in the context of an alleged violation of § 1962(c), stated that a plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." 473 U.S. at 496, 105 S.Ct. at 3285.

[2] with respect to § 1962(c) claims, the *Sedima* Court held that the only compensable injury under the RICO statute is for "harm *caused by [the] predicate acts* . . . " *Id.* at 497, 105 S.Ct. at 3285 (emphasis added). The predicate acts covered by § 1962(c) include the direct or indirect participation in the conduct of an enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt. Accordingly, under *Sedima,* Reddy must demonstrate that the harm he suffered was caused by these predicate acts of racketeering.

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[3]Section 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Reddy's complaint, however, alleges that he was harmed by his discharge from employment, and *not* by the pattern of racketeering activity in which Litton was purportedly engaged.

[3] All of the circuit courts that have considered this issue have held that an employee who is wrongfully discharged for refusing to participate in an alleged pattern of racketeering activity lacks standing to sue under § 1962(c). *See, e.g., Burdick v. American Express Co.,* 865 F.2d 527, 529 (2d Cir.1989) (per curiam) (employee terminated as a result of his complaints about employer's alleged fraudulent activities had no standing to sue under § 1962(c)); *Cullom v. Hibernia Nat'l Bank,* 859 F.2d 1211, 1215-16 (5th Cir.1988) (plaintiff employee's discharge for refusing to participate in a fraudulent bank loan scheme did not satisfy § 1962(c) standing requirement); *Nodine v. Textron, Inc.,* 819 F.2d 347, 349 (1st Cir.1987) (employee's termination after he reported violations of Canadian customs laws and Foreign Corrupt Practices Act to his superiors did not confer standing under § 1962(c)); *Morast v. Lance,* 807 F.2d 926, 933 (11th Cir.1987) (employee discharged for reporting irregular transactions to the Comptroller of the Currency had no standing to sue under § 1962(c)).

We have not as yet addressed the standing requirement of § 1962(c) in the employee termination context. The pattern emerging from the appellate courts is clear, however, and is not undermined by Reddy's reliance on two district court decisions that reached the opposite result. Reddy cites *Williams v. Hall,* 683 F.Supp. 639 (E.D.Ky.1988), and *Komm v. McFliker,* 662 F.Supp. 924 (W.D.Mo.1987), for the proposition that employees who refuse to participate in illegal activities have standing to sue for wrongful termination under RICO. These cases

clearly represent a minority view, and we decline to follow them here. Accordingly, we hold that Reddy lacks standing to sue under § 1962(c) because the injury he suffered was the result of his alleged wrongful termination and was not caused by predicate RICO acts.

B.

[4] Reddy's complaint also alleged violations of § 1962(d),[4] which makes it unlawful for any person to conspire to violate the RICO statute. The developing standing analysis under this subsection turns on whether courts interpret the RICO statute to require that the conspiratorial acts that cause injury must be predicate RICO acts as defined in 18 U.S.C. § 1961(1). In this case, the injury suffered by Reddy was caused by his alleged wrongful discharge, which is not a predicate act under § 1961(1).

Two recent appellate court decisions have addressed this issue, and have taken opposing positions. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir.1989); *Hecht v. Commerce Clearing Housing, Inc.*, 897 F.2d 21 (2d Cir.1990).

The *Hecht* case holds that the plaintiff must have been injured by overt acts that are themselves statutorily defined acts of racketeering in order to have standing under § 1962(d). In the *Hecht* case, the Second Circuit declared that standing under § 1962(d) "may be founded only upon injury from overt acts that are also section 1961 predicate acts, and not upon any and all overt acts furthering a RICO conspiracy.... Because the overt act

[4]Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

of Hecht's discharge was not a section 1961(1) predicate act, his loss of employment does not confer civil standing." 897 F.2d at 25.

The *Shearin* case, however, holds that the plaintiff may have standing to sue even though his or her injury was caused by an overt act of conspiracy that was *not* a defined act of racketeering. In *Shearin*, the plaintiff alleged that she was hired solely to give the appearance of legitimacy to a company that was in fact a front for a fraudulent investment scheme. She further alleged that she was fired by the sham company to prevent her from disclosing its illegal activities. She filed suit alleging violation of § 1962(d) of RICO.

The Third Circuit in *Shearin* held that the hiring and firing of Shearin were overt acts in furtherance of the conspiracy, although those acts were not themselves acts of racketeering as defined by § 1961 of the RICO statute. 885 F.2d at 1167. Nonetheless, the court held that Shearin had standing to sue under § 1962(d). The court based its decision on the fact that "[n]othing in *Sedima* forecloses the possibility that harm arising from an act predicate to conspiracy, yet distinct from the racketeering acts listed in section 1961(1), might yet confer standing so long as the plaintiff has alleged a violation of section 1962(d)." *Id.* at 1169. In deciding that Shearin's firing (although not her hiring) was an injury sufficient to confer RICO standing under § 1962(d), the court was influenced by the fact that Shearin's firing was an overt act that not only established the conspiracy but was "allegedly essential to it." *Id.* at 1168.

Recognizing the split of authority between the Second and Third Circuits on the issue of standing to sue under § 1962(d), we find the facts in the *Hecht* case are more closely analogous to those presented by this appeal. In

Hecht, as in this case, the alleged conspiracy was ongoing and the role of the discharged employee in the conspiracy was peripheral, not central to the very existence of the conspiracy. The unique facts of the *Shearin* case suggest that its holding may appropriately be construed narrowly. Because the hiring and discharge of the plaintiff in *Shearin* were acts that were "essential" to the alleged conspiracy, the *Shearin* case is distinguishable on its facts from this appeal. If, however, there is any doctrinal inconsistency between *Hecht* and *Shearin*, we prefer the rule of *Hecht*. Accordingly, we hold that the district court did not err in dismissing Reddy's § 1962(d) claim on standing grounds because the act of terminating Reddy's employment is not a predicate act as defined by § 1961(1), nor was that act essential to the alleged conspiracy between Litton and the Saudi Arabian officials.

C.

[5] Three of the four appellate courts to consider the issue of standing under § 1962(a)[5] have concluded that the appropriate standing analysis under that section differs from that applied by the *Sedima* Court to § 1962(c). The Second, Third, and Tenth Circuits each have held that, for purposes of § 1962(a), a plaintiff must show injury by reason of *the use or investment of racketeering income* in order to have standing to assert a RICO claim.

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[5]Section 1962(a) states, in pertinent part: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

See Quaknine v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir.1990); *Rose v. Bartle,* 871 F.2d 331, 356-58 (3d Cir.1989); *Grider v. Texas Oil & Gas Corp.,* 868 F.2d 1147 (10th Cir.), *cert. denied,* ____ U.S. ____, 110 S.Ct. 76, 107 L.Ed.2d 43 (1989). Under these decisions, injury by virtue of the predicate acts alone, which is sufficient to confer standing under § 1962(c), is inadequate to confer standing under § 1962(a).

The Fourth Circuit and a minority of lower court opinions take a different view.[6] In *Busby v. Crown Supply, Inc.,* 896 F.2d 833, 837 (4th Cir.1990); the Fourth Circuit held that injury caused by the predicate acts of racketeering is sufficient to state a § 1962(a) violation. *See also, e.g., Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago,* 693 F.Supp. 666, 670-73 (N.D.Ill. 1988), *aff'd on other grounds,* 877 F.2d 1333 (7th Cir.1989).

For purposes of standing under § 1962(a), this circuit has not yet decided whether a plaintiff must show injury by reason of the use or investment of racketeering income, or if the injury caused by the predicate acts of racketeer-

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[6]The decisions of the lower courts in this circuit are split on the issue of adequate standing under § 1962(a). *Compare In Re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.,* 682 F.Supp. 1073 (C.D.Cal.), appeal dismissed on other grounds, 821 F.2d 1422 (9th Cir.1987) (holding that there is no separate standing requirement under § 1962(a) or (b), and injury from the predicate acts alone confers standing) *with In re Rexplore, Inc. Sec. Litig.,* 685 F.Supp. 1132, 1141-42 (N.D.Cal. 1988) (holding that a plaintiff must plead injury due to the use or investment of racketeering income to have standing under § 1962(a)). It is noteworthy, however, that the *National Mortgage* case acknowledged the split of opinion on this issue, and was decided years before the appellate decisions in *Quaknine, Rose,* and *Grider* were issued.

ing is sufficient.[7] The facts of this case do not require us to decide that issue now. Reddy has not pleaded that he was injured by the use or investment of racketeering income, nor has he alleged that he was injured by any of the predicate acts covered by § 1962(c). Rather, he claims that he was injured by his wrongful termination. Accordingly, the district court did not err in dismissing Reddy's § 1962(a) claim.

III.

Appellant contends that, even if the district court properly dismissed his RICO claims, the court's failure to permit him to amend his complaint was reversible error. The district court's dismissal of Reddy's RICO claims with prejudice is reviewed on appeal under an abuse of discretion standard. *Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 738 (9th Cir.1987).

[6, 7] It is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile. *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau,* 701 F.2d 1276, 1292-93 (9th Cir.), *cert. denied,* 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983). Here, it would be futile to permit Reddy to amend his § 1962(a), (c), and (d) claims. His complaint makes

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[7] The issue was raised in *Schreiber Distrib. Co. v. Serv Well Furniture Co.,* 806 F.2d 1393 (9th Cir.1986), but we did not reach the standing issue because the parties had agreed that the Supreme Court's decision in *Sedima* had eliminated that issue from the *Schreiber* appeal. *Id.* at 1395. Therefore, *Schreiber* stands only for the proposition that the Ninth Circuit follows the Supreme Court's *Sedima* decision with respect to RICO standing. Moreover, the *Schreiber* case was decided after *Sedima* but before the *Rose, Grider,* and *Quaknine* decisions were published. In deciding *Schreiber,* therefore, this court did not have the benefit of those opinions.

clear that his injury was caused by his alleged wrongful termination. It was not the result of the alleged predicate acts of racketeering. Nor was it caused by the use or investment of racketeering income. Finally, it was not caused by an overt act of conspiracy that is a defined predicate act under 18 U.S.C. § 1961(1).

It would not be possible for Reddy to amend his complaint to allege a completely new injury that would confer standing to sue without contradicting any of the allegations of his original complaint. Although leave to amend should be liberally granted, the amended complaint may only allege "other facts consistent with the challenged pleading." *Schreiber,* 806 F.2d at 1401 (citation omitted).

Accordingly, the district court's ruling that Reddy's RICO claim should be dismissed with prejudice was not an abuse of discretion because amendment would not cure the deficiencies in the complaint.[8] Affirmed.

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[8] Because amendment of the complaint would be futile, it is not necessary to reach respondent's arguments that Reddy waived his right to amend, or that he has already had sufficient opportunity to amend. In any event, neither argument is persuasive. First, the Ninth Circuit has not adopted the rule followed in some other circuits that dismissal without leave to amend under Rule 12(b)(6) is not an abuse of discretion where the plaintiff has not requested leave to amend. *See, e.g., Manax v. McNamara,* 842 F.2d 808, 813-14 (5th Cir.1988). Further, it is evident that Reddy has not had a prior opportunity to amend his RICO claims, because Litton concedes that these were raised for the first time in Reddy's second amended complaint.